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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 85

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., AND DATA SYSTEMS, INC., PETITIONERS

v.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, AND AMERICAN NATIONAL BANK AND TRUST COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE COMPTROLLER OF THE CURRENCY

OPINIONS BELOW

The opinion of the United States District Court for the District of Minnesota (App. 19–29) is reported at 279 F. Supp. 675. The opinion of the United States Court of Appeals for the Eighth Circuit (App. 31–41) is reported at 406 F. 2d 837.

JURISDICTION

The judgment of the court of appeals (App. 42) was entered on February 6, 1969. The petition for a

writ of certiorari was filed on April 10, 1969, and was granted on June 23, 1969 (App. 43). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the allegation that a competitor's activities are prohibited by statute suffices to confer standing to challenge those activities in the absence of any statutory purpose to protect the plaintiff or any other additional aid to standing.

2. Whether, in applying the principle that standing to complain that a competitor's activities are prohibited exists only if the plaintiff is a member of a class intended to be protected by the statute allegedly violated, standing may be rested solely on a subsidiary policy alleged to lie behind a different statute plainly inapplicable to the defendant competitor.

STATUTES INVOLVED

The pertinent Section of the National Bank Act, 12 U.S.C. 24 Seventh, provides in part:

> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—
>
> * * * * *
>
> Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory

> notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; * * * by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. * * *

Section 4 of the Bank Service Corporation Act of 1962, 12 U.S.C. 1864, provides:

> No bank service corporation may engage in any activity other than the performance of bank services for banks.

STATEMENT

Petitioners in this action are the Association of Data Processing Service Organizations, Incorporated (ADAPSO), whose members sell data processing services to the business community, and Data Systems, Incorporated (Data Systems), a member of that Association. They are seeking here to establish standing to challenge a ruling by the respondent Comptroller of the Currency that as an incident to their banking services national banks such as respondent American National Bank and Trust Company (American Bank) may make data processing services available to other banks and bank customers.

Data processing is a growing and increasingly important element of American business life. Because of the volume of data they must handle in their own affairs, banks have been at the forefront in the use of modern data processing equipment. The question soon arose whether national banks, under the "incidental powers" clause of the National Bank Act, 12 U.S.C. 24 Seventh, could in some circumstances make their own surplus data processing facilities available to

other banks and bank customers. Three successive Comptrollers ruled that such activities were proper; the current ruling was set out in the October 15, 1966, revision of the Comptroller's Manual (App. 21):

> Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers. [Para. 3500.]

On June 15, 1967, petitioners brought this action seeking to invalidate this ruling and to enjoin American Bank from performing data processing services pursuant to it. The complaint stated that the action arose under the National Bank Act and that it involved "an interpretation and application of" that Act and a "determination of the powers granted" national banks "under that Act as set forth in 12 U.S. Code § 24" (App. 5). In accordance with this general statement of the nature of the suit, the complaint asserted that the action of the Comptroller and the Bank contravened 12 U.S.C. 24 Seventh (App. 6). No violation of any other statutory provision was claimed.[1]

The complaint also set out the harm which allegedly would result from the Comptroller's ruling (App. 6–8):

* * * * *

[1] The complaint also sought $100,000 in damages from American Bank (App. 9), presumably for tortious interference with contract rights (see App. 7–8). This claim was not mentioned as a basis for standing to attack the Comptroller's ruling in petitioner's brief in the district court, and was referred to only briefly in the court of appeals. It is not relied upon in this Court.

11. * * * [T]he marketing of data processing services by national banks has been growing rapidly, and is anticipated to grow even more rapidly in the future.

* * * * *

16. * * * DATA SYSTEMS has been deprived of the right and opportunity to perform * * * [certain data processing] services [for a potential customer] and to be compensated therefor.

* * * * *

18. * * * By performing said illegal data processing services, and by holding itself out as willing and able to perform such services, AMERICAN BANK has caused and unless enjoined will continue to cause substantial and irreparable harm to DATA SYSTEM's business and to the business of other members of ADAPSO, by depriving them of customers for whom data processing services would be rendered and from whom compensation would be received.

No allegation was made that American Bank or other national banks risked injury to the public interest in preserving the financial stability of banks through engaging in the practices concerned.

Both respondents moved to dismiss the complaint on the ground that these allegations of threatened competitive injury did not give petitioners standing to maintain the action (App. 15, 17). The district court granted the motions to dismiss (App. 18–19), and the court of appeals affirmed (App. 42). The court of appeals concluded, after an exhaustive analysis of the decisions of this Court and of the various courts of appeals, that a competitor may challenge allegedly "illegal" competition only when he can

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show (1) a legal right to be free from competition by reason of a governmental charter; or (2) that specific legislation authorizes him as an "aggrieved person" to sue in the public interest; or (3) that he is a member of a class given express statutory protection against the competition which he seeks to attack. It then found that data processing service companies possess no property right by virtue of franchise or charter to be free from competition, that there is no "person aggrieved" review provision in the National Bank Act, and that it was not a legislative purpose of the Act to confer statutory protection on the competitors of national banks (App. 40–41). Petitioners' argument that such a purpose is reflected in the Bank Service Corporation Act, which permits two or more banks to form a joint subsidiary to perform such "bank services for banks," was held to be "misplaced" (App. 40, n. 12). In these circumstances, the court reasoned, petitioners' claim to standing amounted to (App. 41):

> * * * an attempt merely to show "a common concern for obedience to law." *L. Singer & Sons* v. *Union Pac. R.R.*, 311 U.S. 295, 304 (1940). As pronounced in *Singer*, outside statutory consent, the general or common interest can find protection only in the standing granted to public authorities. Unless a relevant statute provides for a "party in interest" to seek judicial review or unless a complainant possesses a recognized legal interest, he lacks standing to be a "private attorney general" to represent the public interest.

ARGUMENT

INTRODUCTION AND SUMMARY

Petitioners brought this action to challenge the ruling of the Comptroller of the Currency that national banks may perform data processing services for other banks and bank customers. They contend that the performance of such services is not within the purview of the provisions of the National Bank Act, 12 U.S.C. 24 Seventh, authorizing national banks to exercise "such incidental powers as shall be necessary to carry on the business of banking," and complain that the effect of national bank activity in this area will be to provide additional competition to data processing service companies. Petitioners do not contend that the Comptroller is attempting to regulate their own activities in any fashion or that data processing service companies are threatened with any injury other than the increased competition which will be provided by national banks as a result of the Comptroller's ruling.

While the gravamen of petitioners' complaint is thus competitive injury, and competitive injury alone, petitioners do not and could not assert that data processing service companies possess any form of franchise or license which gives them the right to operate exclusively in this field and to prevent others from entering it. The data processing service industry is on the same footing as the vast majority of American manufacturing and service industries, in which free and open competition is not merely permitted but encouraged.

In these circumstances, we submit, the courts below correctly concluded that petitioners lack standing to maintain this suit. This Court's decisions over a period of almost 100 years firmly established that where, as here, there is no special statutory provision for judicial review, a complainant seeking to attack governmental action which does no more than increase competition against him must show that he possesses a legally protected right to be free from that competition. If, as here, no such right is conferred by franchise or license, the plaintiff must be able to demonstrate that the statutory enactment alleged to have been violated was intended for his protection against the competition complained of. Petitioners' complaint alleges only a violation of the "incidental powers" clause of the National Bank Act. Their invocation now of the Administrative Procedure Act and the Bank Service Corporation Act—intended to consolidate prior law and to govern the acts of entirely different banking corporations, respectively—is insufficient to show a congressional judgment that they should be empowered to test the construction of the incidental powers clause in the nation's courts. Since the National Bank Act was not designed for the protection of potential competitors of national banks, they have no standing to challenge the Act's interpretation.

I. Standing To Complain of Competition Made Possible by Governmental Action Is Dependent Upon a Showing of a Legally Protected Right To Be Free From That Competition

The question of standing in a judicial forum to attack competitive activity made possible by governmental action was first thoroughly explored by this Court in *Railroad Co.* v. *Ellerman,* 105 U.S. 166. There the plaintiff was conducting a public wharfing business in New Orleans when the Louisiana legislature passed a resolution authorizing the defendant railroad to engage in a similar business in New Orleans, in competition with him. Plaintiff alleged, first, that engaging in the wharfing business would violate the railroad's charter from the state legislature and was therefore *ultra vires* (105 U.S. at 173); and, second, that the legislative resolution allowing this competition was unconstitutional (*id.* at 170). Since these claims in no way reflected on any right of the plaintiff to be free from competition by another wharfinger, this Court found them insufficient to establish—

> * * * any legal interest which entitles him to enjoin the company from using its wharf as a public wharf beyond the limits of such use, as defined by that construction of the joint resolution. If he has such interest, it can only consist in preventing competition with himself as a wharfinger, which such more extensive use of the railroad property would create. And if the right to assert it exists, it must rest * * * on the allegation merely that such use is beyond the corporate powers of the company. * * * The

> damage is attributable to the competition, and to that alone. ***But the competition is not illegal. It is not unlawful for any one to compete with the company*** [*sic*—should be *appellee*], ***although the*** [*company*] ***may not be authorized to engage in the same business.*** The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty. A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in preventing the usurpation and perversion of its franchises, because it is a trustee of its powers for uses strictly public. ***In these questions the appellee has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him.*** The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. ***If he alleges that the railroad company is acting beyond the warrant of law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights.*** The company is not shown to owe him any duty which it has not performed. [*Id.* at 173–174; emphasis added.]

One has no standing to assert that a competitor, or the government in authorizing competition, is behaving illegally in the abstract. In this Court's more re-

cent language, there must be "a logical nexus between the status asserted [by a plaintiff] and the claim sought to be adjudicated." *Flast* v. *Cohen,* 392 U.S. 83, 102. The plaintiff must establish that the assertedly unlawful grant of authority to the competitor invades some legally protected right, *personal to him,* to be free from the competition. Thus, in *Ellerman,* the railroad's wharfinger activities—even if "beyond the warrant of law"—violated no duty owed to the plaintiff, since the law did not entitle him to create or protect a monopolistic position in the field of enterprise involved.

The teaching of *Ellerman* is still vital. *Tennessee Power Co.* v. *Tennessee Valley Authority,* 306 U.S. 118, 140, n. 11; *Hardin* v. *Kentucky Utilities Co.,* 390 U.S. 1, 5–6. In *Tennessee Power,* various power companies sought to restrain the Tennessee Valley Authority (T.V.A.) from competing with them in the sale of electric power, alleging that the Act allowing this competition was unconstitutional, and that they had "the right to be free from illegal competition." 306 U.S. at 124. This Court reiterated that such allegations were insufficient to confer standing:

> * * * unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege. * * * The pith of the complaint is the Authority's competition. But the appellants realize that competition between natural persons is lawful. * * *
>
> * * * * *

> The appellants further argue that even if invasion of their franchise rights does not give them standing, they may, by suit, challenge the constitutionality of the statutory grant of power the exercise of which results in competition. * * * If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is *ultra vires, that there is a defect in the grant of powers to it,* or that the means of competition were acquired by some violation of the Constitution. The contention is foreclosed by prior decisions that the damage consequent on competition, otherwise unlawful, is in such circumstances *damnum absque injuria,* and will not support a cause of action or a right to sue. [*Id.* at 137–140; emphasis supplied; footnotes omitted.]

In its *Hardin* decision just two Terms ago, this Court specifically approved both *Tennessee Power* and *Ellerman.*[2] *Hardin* was a suit by a private power company seeking to enjoin the T.V.A. from supplying electric power in a certain area in competition with the power company. The complaint alleged that the extension of service into that area would contravene a 1959 amendment to the Tennessee Valley Authority Act which precluded T.V.A. from expanding its sales outside the area for which it was the primary source of power on a specified date.

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[2] We discuss below (p. 30*ff*, *infra*) petitioners' insistence (Br. pp. 20 *et seq.*) that *Tennessee Power* was incorrectly decided and should be reexamined by this Court.

Addressing itself first to the question of the power company's standing to enforce the statutory restriction, this Court pointed out that it had

> * * * repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations. *Railroad Co.* v. *Ellerman,* 105 U.S. 166 (1882); *Alabama Power Co.* v. *Ickes,* 302 U.S. 464 (1938); *Tennessee Power Co.* v. *T.V.A.,* 306 U.S. 118 (1939); *Perkins* v. *Lukens Steel Co.,* 310 U.S. 113 (1940) [390 U.S. at 5–6].

Competitive injury provided no basis for standing in those cases because

> * * * the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury [*id.* at 6].

On the other hand, the Court concluded,

> * * * when the particular statutory provision invoked *does* reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision [*ibid.;* emphasis added].

In the circumstances of *Hardin,* this Court found it "clear and undisputed" from the Act and its legislative history that "one of the primary purposes of the area limitations * * * was to protect private utilities from TVA competition."[3] *Id.* at 6. Thus, "[s]ince

[3] The Court pointed to a committee report and several statements of individual members of both Houses in connection with the 1959 amendment which made it "clear and undis-

[the power company] is * * * in the class which [the enactment] is designed to protect, it has standing under familiar judicial principles to bring this suit * * *." *Id.* at 7.

In sum, under an unbroken line of decisions in this Court, competitor standing cannot be supported simply by the assertion that the defendant's competing activity is illegal in the abstract. Rather, the threatened competition must invade some legally protected interest which the plaintiff itself possesses. Such an interest can stem from either (1) a specifically conferred property right (*e.g.*, in the form of a franchise or license) to be free from the allegedly illegal competitive activity (cf. *Frost* v. *Corporation Commission*, 278 U.S. 515); or (2) a clear legislative intent, underlying the statutory provision claimed to have been violated, to confer protection from competitive injury upon the plaintiff or his class (*Hardin* v. *Kentucky Utilities Co., supra*). But it must be there.

> [T]he concept of standing focuses on the party seeking relief, rather than on the precise nature of the relief sought. * * * The decisions of this Court have also made it clear that something more than an "adversary interest" is necessary to confer standing. There must in addition be some connection between the official action challenged and some legally protected interest of the party challenging that action. See *Flast* v. *Cohen, supra, at* 101–106. [*Jenkins* v. *McKeithen*, 395 U.S. 411, 423.]

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puted that protection of private utilities from TVA competition was almost universally regarded as the primary objective of the limitation." 390 U.S. at 7.

Standing cannot be asserted, as petitioners would have it (Br., pp. 11–12), on simply a strong "adversary" interest.[4]

The courts of appeals have, for the most part, followed this Court's decisions in the area of competitor standing and have refused to find standing absent a statutory aid of some kind. See, *e.g.*, *Pennsylvania Railroad Company* v. *Dillon*, 335 F. 2d 292 (C.A.D.C.), certiorari denied *sub nom. American-Hawaiian S.S. Co.* v. *Dillon*, 379 U.S. 945; *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F. 2d 859 (C.A. 5), certiorari denied, 385 U.S. 815; *Arnold Tours, Inc.* v. *Camp*, 408 F. 2d 1147 (C.A. 1), petition for certiorari pending, No. 128, O.T., 1969; *The Wingate Corp.* v. *Industrial National Bank*, 408 F. 2d 1147 (C.A. 1), petitions for certiorari pending, Nos. 129 and 225, O.T., 1969. But cf. *Saxon* v. *Georgia Ass'n of Independent Insurance Agents, Inc.*, 399 F. 2d 1010 (C.A. 5);[5] *National Ass'n of Securities*

[4] Contrary to petitioners' belief (Br., pp. 28–29), *Chicago* v. *Atchison, T. & S.F. R. Co.*, 357 U.S. 77, is not in conflict with *Tennessee Power*. That case involved a complaining party which had been issued a license to operate its transportation company within the city limits. This, along with the competitive restrictions of a city ordinance, conferred upon it "the right to be free from unlawful competition." 357 U.S. at 83.

[5] In *Georgia Ass'n.* the plaintiff insurance agents were held to have standing to enforce 12 U.S.C. 92, which deals expressly with the subject of insurance activities on the part of national banks. One ground of the decision was that the legislative history of Section 92 manifested a congressional intent to protect insurance agents from competition on the part of national banks (399 F. 2d at 1018). The court also concluded, however, that the plaintiffs' assertion that the competitive activity was illegal (*i.e.*, in violation of Section 92) was in itself sufficient to confer standing (399 F. 2d at 1017). This latter conclusion is plainly inconsistent with the holdings of this Court and, in-

Dealers, Inc. v. *Securities and Exchange Commission* (C.A.D.C., No. 20,164, decided July 1, 1969).[6]

The very recent decision of the Court of Appeals for the Fifth Circuit in *Troutman* v. *Shriver* (Appendix A, *infra*) is illustrative. In *Troutman,* a practicing attorney in Orange County, Florida, and four county bar associations as would-be intervenors, sought to enjoin the institution of legal aid service programs in Orange County and three other Florida counties by the Director of the Office of Economic Opportunity. According to the plaintiff, if that plan were carried out, he would be forced to compete with OEO lawyers for a clientele who could afford to obtain repre-

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deed, was sharply criticized by both the court below in this case (App. 38, n. 10) and the First Circuit in *Arnold Tours, Inc.* v. *Camp, supra.*

[6] In *National Ass'n of Securities Dealers,* members of the mutual fund industry sought to challenge the Comptroller's authorization to a national bank to operate a commingled managing agency account which would compete with mutual funds. The district court held that the plaintiffs had standing and then concluded on the merits that, *inter alia,* the operation of a commingled managing agency account violated penal provisions of the Glass-Steagall Act. The court of appeals reversed on the merits. With respect to standing, the majority of the panel expressed its "reservations amounting to virtual disbelief in" the plaintiffs' standing. While being "unable to set aside [its] grave doubts" in this regard, the majority nevertheless decided to resolve those doubts in favor of standing because of its belief that there was a "need for judicial examination of the important questions raised" (slip op. pp. 46, 47). Presumably, it had in mind the fact that a reversal of the judgment on standing grounds alone would have left unresolved the question as to whether, as the district court had ruled, the bank was engaged in criminal activity. In the circumstances, that case can be fairly regarded as *sui generis.*

sentation by him. He asserted that the Economic Opportunity Act of 1964, as amended, 78 Stat. 508, 42 U.S.C. 2701 *et seq.*, was unconstitutional and that the establishment of the legal aid service programs was in excess of the Director's statutory authority. Without reaching the merits, the district court dismissed the complaint on the ground that neither the attorney nor the bar associations had standing to maintain the action. The Fifth Circuit affirmed.

After rejecting the claims of standing as taxpayers and "as citizens and attorneys," the court in *Troutman* turned to the assertion that the plaintiff and intervenors had standing "because of their position as competitors." The restriction of the practice of law in Florida to those who have been examined and found qualified is, the court held, designed "to protect the public from being advised and represented in legal matters by unqualified persons"—and not "to aid or protect the members of the legal profession either in creating or maintaining a monopoly or closed shop. * * * [T]he decisions of the courts appear to be uniform in denying standing to competitors who otherwise possess no legal right to be free from competition" (*infra,* p. 40). In response to a *Hardin* argument based on a 1967 Amendment to the Act, which the court found from its examination of the legislative history not to have been intended to protect the asserted competitive interests, the court added:

> * * * There are times when competitors are given standing by Congress to challenge competition which allegedly is in violation of a statute where the statute itself is said to be enacted for the express protection of the class

> of competitor complaining. In order to fall within this classification, however, the particular statutory provision invoked must reflect a legislative purpose to protect a competitive interest, *Hardin* v. *Kentucky Util. Co.*, 390 U.S. 1, 5-6, 88 S. Ct. 651, —, 19 L. Ed. 2d 787, 792 (1968). But where, as here, the purpose of the statutory provision is simply to benefit the public at large * * * no right, nor legal standing, is conferred [App., *infra*, p. 43].

This contemporary pronouncement by a court of appeals respecting competitor standing reflects an accurate understanding and application of the governing principles in this sphere. And see also, to the same effect, *South Suburban Safeway Lines* v. *City of Chicago, et al.* (C.A. 7, No. 17,179, decided October 6, 1969), holding that a bus company lacks standing to challenge federal assistance to a competing rail transportation system under the provisions of the Urban Mass Transportation Act of 1964.

II. Data Processing Service Companies Have No Legally Recognized Interest in Freedom From Competition Generally, or From the Competition of National Banks in Particular

Applying these settled principles to the present case, we think it clear that the court below was correct in its conclusion that petitioners lack standing. The Comptroller's ruling that, under the "incidental powers" clause of 12 U.S.C. 24 Seventh, national banks may provide data processing services to other banks and bank customers does not invade any legally

recognized interest of data processing companies to be free from such competition. And there is no other basis upon which petitioners can assert such an interest.

1. It is undisputed that petitioners and their class have not been given, by franchise or otherwise, any general right to restrictions upon those who may engage in data processing activities. Thus, their standing is dependent upon whether, in the words of *Hardin*, "the *particular statutory provision* invoked [reflects] a legislative purpose to protect a competitive interest"; if, but only if, such purpose appears, "the injured competitor has standing to require compliance *with that provision.*" 390 U.S. at 6 [emphasis supplied].

The single statutory provision invoked in petitioners' complaint was 12 U.S.C. 24 Seventh—the "incidental powers" clause of the National Bank Act. It is solely that provision which petitioners claim to be violated by the challenged data processing activities on the part of national banks. Yet, in this Court, as in the courts below, petitioners do not contend that Section 24 Seventh had any purpose—let alone a "primary" purpose such as was found in *Hardin* with respect to the T.V.A. Act—to protect the interest of potential competitors of national banks. The reason is clear: the legislative history of the Section dispels all possible doubt that its enactment in 1864 (13 Stat. 101) was for the express and sole purpose of creating a strong national banking system, initially

to assist in the alleviation of the financial crisis occasioned by the Civil War.[7] To the extent that the protection of a competitive interest was at the bottom of the enactment of Section 24 Seventh, it was the interest of the national banks and not of their competitors.[8]

2. Confronted with this lack of any protective purpose in the only statutory provision invoked in their complaint, petitioners now endeavor (Br., pp. 30–41) to find the requisite statutory aid to standing in the Bank Service Corporation Act of 1962—a statute which does not purport to be directed to the business activities of national banks and which petitioners do not seriously claim itself forbids the activities which they seek to enjoin.

Specifically, they rely on Section 4 of that Act, 12 U.S.C. 1864, which provides that "[n]o bank service corporation may engage in any activity other than the performance of bank services for banks." Although this restriction in terms applies only to a bank service corporation,[9] petitioners maintain that it gives them a

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[7] See Special Message of President Lincoln, Sen. Jour., 37th Cong., 3d Sess., pp. 121–122; Annual Report, Secretary of the Treasury, 38th Cong., 1st Sess., pp. 19–21, reprinted in Federal Banking Laws and Reports (1780–1912), Senate Committee on Banking and Currency, 88th Cong., 1st Sess., pp. 345–347.

[8] See, *e.g.*, *Arnold Tours, Inc.* v. *Camp*, *supra*, 408 F. 2d at 1150–1151; *National Ass'n of Securities Dealers, Inc.* v. *Securities and Exchange Commission*, *supra*, at 16; *National Bank* v. *Matthews*, 98 U.S. 621, 626; 108 Cong. Rec. 22031 (1962) (remarks of Sen. Proxmire).

[9] A "corporation organized to perform bank services for two or more banks, each of which owns part of the capital stock of

legally protected interest in preventing competition by national banks under the National Bank Act. As this Court held in *Hardin,* however, the requisite aid to standing must be found in "the particular statutory provision invoked" on the merits. The reason for the articulation of the rule in these terms is not difficult to perceive. Since the crux of the issue of standing is the status of the plaintiff and not the challenged activity of the defendant, only those persons stating a legally recognized grievance may invoke the power of the courts to invalidate governmental action. *Flast* v. *Cohen, supra,* 392 U.S. at 101–106. A necessary ingredient of a legally recognized grievance is, of course, that the plaintiff has been harmed. It follows that when a plaintiff asserts, as a basis for standing, that a particular statute was intended to protect him or his class from a certain injury, it is incumbent upon him to allege that that injury—and not some other injury to which the statute is not addressed—has occurred.

In the framework of the present case, this means that to invoke Section 4 of the Bank Service Corporation Act as the statutory aid to standing, petitioners must be in a position to allege that that section has been violated and that they have been harmed as a consequence. No such allegation is made, nor is the American Bank a corporation subject to Section 4 or a stockholder of such a corporation. Assuming, then, that Congress has granted a legally recognized interest to petitioners insofar as the restriction in Section 4

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such corporation, and at least one of which is subject to examination by a Federal supervisory agency," 12 U.S.C. 1861(c).

upon the activities of bank service corporations is concerned, that interest has not been jeopardized.

Nor can we agree with the suggestion of the First Circuit in *The Wingate Corp.* v. *Industrial National Bank, supra,* that Section 4 of the Bank Service Corporation Act may in fact "impliedly prohibit national banks from directly entering into the data processing service business," 408 F. 2d at 1153. The legislative history of the Bank Service Corporation Act reflects that both congressional committees were aware that national banks were already providing data processing services of the kind challanged by petitioners. Chairman Martin of the Federal Reserve Board testified before the House Committee that:

> Notwithstanding the high initial cost of equipment of this kind, some banks—especially the larger banks—are purchasing or leasing this equipment. Other banks are gaining access to this equipment through various contractual arrangements with data processing centers operated by private commercial concerns, and *some banks that have purchased or leased this equipment are doing data processing for other banks and business concerns.* [Emphasis supplied.]

Hearings before the House Committee on Banking and Currency on H.R. 8874, 87th Cong., 2d Sess., p. 34. A staff member of the Board provided the same information to the Senate Committee. Hearings before the Senate Committee on Banking and Currency on H.R. 8874, 87th Cong., 2d Sess., p. 64. Yet neither Committee report (H. Rep. No. 2062, 87th Cong., 2d Sess.; S. Rep. No. 2105, 87th Cong., 2d

Sess.) contained any suggestion either that such bank activity was illegal or that it should be proscribed.[10]

The question of the legality of the data processing activities of national banks is, of course, not now before this Court. We submit, however, that this legislative history highlights the unavailability of the Bank Service Corporation Act as a vehicle for asserting a protected right to question that legality. For it is difficult to see how it can be seriously contended that that Act was intended to give petitioners a legal interest in preventing competition on the part of national banks when, with full knowledge of the fact that such competition existed, neither congressional committee addressed itself to the subject at all in reporting out the Act. While it may well be true that national banks and bank service corporations are not wholly unrelated (Pet. Br., p. 37), Congress has clearly manifested its belief that the two

[10] Petitioners quote (Br., pp. 31–32) a colloquy on the floor of the House between Representatives Reuss and Roosevelt, in which the former (a member of the House Committee) specifically acknowledged that banks were then able to furnish data processing services "without limitation". Petitioners' attempt to draw an implication from the colloquy that Mr. Reuss believed that the Bank Service Corporation Act was intended to impose a limitation on national banks as well as bank service corporations. But Mr. Reuss' quoted remarks, taken as a whole, make it clear that he deemed the limitation to which he referred to be applicable only to bank service corporations. Moreover, petitioners do not attempt to explain why, if Mr. Reuss was of the view which they attribute to him, he did not seek to have Section 4 written so as to apply in terms to banks (which he knew were not merely able then to provide data processing services but, in fact, were doing so).

are not the same thing and, accordingly, has dealt with them in different statutes containing different provisions. Whether that fact was the product of compromise or policy determinations, its existence cannot be ignored. In determining standing, therefore, the courts below properly looked only to the National Bank Act, and not to the Bank Service Corporation Act.[11]

3. Petitioners contend in this Court for the first time (Br., pp. 39–41) that the judicial review provisions of Section 10(a) of the Administrative Procedure Act, 5 U.S.C. (Supp. IV) 702(a), provide a basis for standing. Numerous courts of appeals have considered the question as to whether Section 10(a) was intended to alter accepted concepts of standing and have uniformly concluded that it did not eliminate the requirement that plaintiffs establish a congressional purpose underlying the allegedly violated statutory provisions "to bestow upon them a legal right to protection from [the complained of] competition," *Pennsylvania Railroad Company* v. *Dillon,* 335 F. 2d

[11] For present purposes we have assumed that petitioners are correct in their assertion that a primary purpose of the Bank Service Corporation Act was to protect some kind of competitive interest of data processing service companies. We note, however, that the only support that they offer for this assertion is the statement of a single Senator on the floor of the Senate (Br., p. 35). Such a statement is highly suspect as evidence of the intention of Congress as a whole. See *Duplex* v. *Deering*, 254 U.S. 443, 474–475. At the very least, it falls far short of the legislative history which persuaded this Court that a primary purpose of the statutory enactment in *Hardin* v. *Kentucky Utilities* was to protect a competitive interest. See p. 13 and n. 3, *supra*. This Court need not, however, reach this point.

292, 295 (C.A.D.C.), certiorari denied *sub nom. American-Hawaiian S.S. Co.* v. *Dillon,* 379 U.S. 945; *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924, 932 (C.A.D.C.), certiorari denied, 350 U.S. 884; *Braude* v. *Wirtz,* 350 F. 2d 702, 707–708 (C.A. 9); *Arnold Tours, Inc.* v. *Camp, supra,* 408 F. 2d at 1151. See also Jaffe, *Judicial Control of Administrative Action* (1965) 528–531. Nor can it be said that, for the purposes of this action, the Bank Service Corporation Act is a "relevant statute" within the meaning of Section 10(a); for the reasons we have given, that Act simply does not apply at all. This being so, petitioners are not "adversely affected or aggrieved by agency action within the meaning of a relevant statute."

III. There Is No Sound Reason Why This Court Should Overturn Its Consistent Holdings That Standing Is Dependent Upon the Assertion of a Legally Protected Right

Apparently conceding the difficulties they face if this Court adheres to the settled principle that a plaintiff claiming standing must show a "logical nexus" between his status—*i.e.,* legal posture—and the legal questions he seeks to have resolved, petitioners seek to induce this Court to repudiate that principle, chiefly by an assault on *Tennessee Power, supra.* Of course, that case was only one of the many to recognize the principle. While criticism of the principle has not been lacking from those who would prefer a standard of "aggrievement in fact," notably Professor Davis, few if any courts have consciously departed from it.

See pp. 15–16, *supra*. We submit that there is no sound reason now to do so.

1. The "legal right" test, most strongly stated in *Tennessee Power,* is not circular, as petitioners contend, but embodies important governmental policies independent of the legality of the acts ultimately in question. The established test draws a clear and valid distinction between a *plaintiff's* legal interests, which determine standing, and the issue of the legality of a *defendant's* acts, which is pertinent only if the merits are reached. For a variety of reasons, the law could permissibly make the judgment that the legality *vel non* of certain types of activity ought to be a matter of indifference to one or another class of persons. This may be in order to promote the overall efficiency of the judicial system by some reduction of the opportunities for litigation, to avoid undue interference with the operations of government, to assure proper presentation, or, in the case of competitor standing, to aid a general social policy in favor of competition in economic affairs. Allowing established enterprises to oppose the entry of new competitors on the ground that they "have no right" tends to inhibit entry, and with it competition. It is not, then, circular to make the judgment, in the context of a society generally dedicated to the encouragement of competition in economic affairs, that businessmen should not be free to interfere with prospective competitors in the absence of a rather specific legislative determination that there are potential injuries from which they need protection. Jaffe, *op. cit. supra,* 509–510; see also *Marine Space*

Enclosures v. *Federal Maritime Commission*, C.A.D.C., No. 22,936, July 30, 1969, slip op., pp. 20–21. Such is precisely the reasoning of *Ellerman*, *Tennessee Power*, and *Hardin*.

2. It is highly relevant, in a system where the "legal right" test has been the firmly established standard for many years, that Congress has known how to make exceptions when it concludes that public policy requires the conferring of a right to review upon those who can claim only an "aggrievement in fact." See, *e.g.*, Section 9(a) of the Securities Act of 1933, 15 U.S.C. 77i(a) ("person aggrieved"); Section 24(a) of the Public Utility Holding Company Act of 1934, 15 U.S.C. 79x(a) (same); Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b) (same); Section 701(f)(1) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 371(f)(1) (persons "adversely affected"); Section 1(20) of the Interstate Commerce Act, 49 U.S.C. 1(20) ("any party in interest"). That Congress has not enacted such a provision in the National Bank Act is especially pertinent because "the banking field has traditionally been an area of particular congressional concern marked by legislation responsive to new problems." *First Agricultural National Bank of Berkshire County* v. *State Tax Commission*, 392 U.S. 339, 345.[12]

[12] The congressional inaction here cannot be attributed to th absence of a request for such relief. Petitioner ADAPSO itself has testified before Congress concerning the need for review provisions to be written expressly into regulatory statutes of this kind, and the power of Congress to ensure review in this matter. Hearings before the House Committee on Banking and Currency on H.R. 6778, 91st Cong., 1st Sess., pp. 527–528, 560, 570–571.

As the court below observed (App. 36–37), the special "aggrieved persons" review provisions have been enacted by Congress in areas where there has been a "patently recognized need for judicial review even though the competitive business controlled is considered free and otherwise unrestricted"; while one qualifying as a "person aggrieved" may be "without a private 'legal right' to protest unauthorized competition," he nevertheless is given standing by the review provision "to act in the public interest". This analysis is fully supported by this Court's decisions in *Federal Communications Commission* v. *Sanders Radio Station,* 309 U.S. 470, 475–478, and *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U.S. 4, 14–15. See, also, *Office of Communication of United Church of Christ* v. *Federal Communications Commission,* 359 F. 2d 994, 1001–1002 (C.A.D.C.); *Associated Industries* v. *Ickes,* 134 F. 2d 694, 702–704 (C.A. 2), vacated as moot, 320 U.S. 707. But Congress has not considered the regulation of national bank activities an area warranting such creation of private attorneys general.

Indeed even if Congress were interested in deputizing private parties to enforce "the proper functioning of the national banking system" (Pet. Br., p. 18), it would not necessarily choose parties with limited private interests unrecognized by statute, such as petitioners, to do so.[13] As this Court has recognized, such

[13] Without at all conceding that the *amicus* Sierra Club has the standing it asserts in the litigation in which it is presently involved, we note that its situation appears to differ from petitioners' in this regard. For it claims as the basis of standing not a private injury unrelated to the statutory scheme invoked, but a public injury assertedly prohibited by it. Whether Congress

parties are not motivated by the "common concern for obedience to law," *L. Singer & Sons* v. *Union Pac. R. Co.*, 311 U.S. 295, 304, which they profess.

> To entrust the vindication of this public interest to a private litigant professing a special stake in the public interest is to impinge on the responsibility of the public authorities designated by Congress. [*Id.* at 306 (Frankfurter, J., concurring for five members of the Court).]

Congress is of course, under no obligation to create a right, or remedy, for every alleged wrong—even those assertedly perpetrated by public officials. Nor is it appropriate for courts to fashion remedies in Congress' stead—especially where the injury asserted is not of the type historically regarded as appropriate for judicial redress. The remedies which Congress chooses to afford or deny are as significant a part of the statutory structure as the apparent legal framework it creates. If it delegates authority to an agency or official with only limited authority for judicial review, it intends the effects of those limitations as much as any other feature of the scheme. In the absence of constitutional claims, which petitioners do not advance here, there is no greater justification for interference with that feature than with any other.

Adherence to the established rubric of standing, where Congress has not provided otherwise, does not leave remediless those who, like petitioners, can estab-

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may be thought to have authorized "private Attorney Generals," *Associated Industries*, *supra*, 134 F. 2d at 704, to act in these circumstances is a separate issue, not before the Court at this time.

lish only aggrievement in fact. Nor does it leave unprotected the "strong public interest in the functioning of the banking system" (Pet. Br., p. 19) of which petitioners claim to be the only guardians. Underlying much of petitioners' argument is the implicit premise that only the courts are both able and willing to superintend administrative compliance with statutory mandates. But, as the Fifth Circuit pointed out in *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F. 2d 859, 865, certiorari denied, 385 U.S. 815, Congress also is equipped to oversee the administration of its laws and, in fact exercises that function. This observation, made in the context of a complaint regarding non-compliance with the Rural Electrification Act, is applicable *a fortiori* to the Comptroller's administration of the banking laws. For, as this Court has observed, "[t]here are important committees on banking and currency in both Houses which continually monitor banking affairs and propose new legislation when changes are felt to be needed." *First Agricultural National Bank of Berkshire County* v. *State Tax Commission, supra,* 392 U.S. at 341.

What petitioners are endeavoring to do in this action is to enforce a particular Act of Congress. But, as we have shown, Congress has made a choice as to how the public interests reflected in that Act should be protected. By declining to establish a "person aggrieved" judicial review provision, Congress has chosen not to establish persons "aggrieved in fact" as private attorneys general to represent the public inter-

est, and it has not given them any private legal interest in enforcement of the Act. Petitioners' assertion that "aggrievement in fact" should be the sole measure of standing would nullify that choice in this and every other situation where Congress has made it; indeed, all of the specific "person aggrieved" review provisions would become entirely meaningless. This Court should not disregard the choice that Congress has made.

3. Of the countless governmental actions taken daily, many have at least an indirect adverse economic impact upon (*i.e.*, result in "aggrievement in fact" to) some citizens or groups. An across-the-board "aggrievement in fact" standard would vastly expand the role of the courts, effectively tearing down the substantial insulation they have under present general standing rules from intimate involvement in the affairs of government.[14] This effect would be felt even were the courts given some latitude to accept or deny standing on the basis of the degree of significance of the alleged statutory violation or of the seriousness or extent of the aggrievement asserted by the plaintiff. Such facts frequently would not be susceptible of evaluation until after a full trial; there is no reasonably precise formula that could be devised to determine the

[14] Some proponents of the elimination of the "legal right" test of standing have pointed to the relatively few taxpayers suits brought (where authorized) to challenge state and local governmental action. Whether or not attributable in some measure to an inhospitable attitude on the part of state courts to such suits, this provides no basis for forecasting a like experience if an aggrievement in fact test were to be applied to attempts to challenge actions of the federal government.

sufficiency of aggrievement. The result would be to inject an undesirable element of uncertainty and lack of uniformity in the resolution of what is essentially a jurisdictional issue. It would be difficult if not impossible in many instances for a potential plaintiff to make an intelligent judgment in advance of filing suit whether his aggrievement would be found of sufficient consequence to confer standing.

No such problems are inherent in the *Tennesse Power* view of standing, as amplified in *Hardin*. Unless the aggrieved person can show the invasion of a personal legal interest, judicial intervention is required only if Congress has manifested a determination that there is involved an important public interest which can be best safeguarded by making judicial review available. And since there are relatively few statutes containing "person aggrieved" review provisions, the problems of evaluating aggrievement arise relatively seldom and in well-defined areas. To be sure, in the larger number of situations governed by the general rule there may from time to time be room for legitimate difference of opinion as to whether the plaintiff has a legally protected right. But the standards which this Court has evolved are clear, simple, and comparatively easy of application. In general, there is no concrete evidence that, in the utilization of the "legal right" test over the years, the courts have encountered in any substantial measure the difficulties which petitioners claim exist in that test.

In sum, we respectfully submit that this Court should once again reaffirm—not depart from—the rule of *Ellerman, Tennessee Power* and *Hardin*. That rule is founded upon the fundamental proposition that, in our form of government, the function of the judicial branch is essentially that of a guardian of *legal* rights and interests—as well as the additional recognition that a person has no legal right to prevent competition unless and to the extent that the legislature has chosen to confer that right. These propositions are just as valid today as they were when enunciated in *Ellerman*. And their observance is just as essential to the proper working of all three branches of government.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the court of appeals should be affirmed.

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OCTOBER 1969.

APPENDIX

In the United States Court of Appeals for the Fifth Circuit

No. 25539

RUSSELL TROUTMAN, ET AL., APPELLANTS

v.

SARGENT SHRIVER, DIRECTOR, OFFICE OF ECONOMIC OPPORTUNITY, AND UNITED STATES OF AMERICA, APPELLEES

Appeals from the United States District Court for the Middle District of Florida

September 30, 1969

Before: THORNBERRY and SIMPSON, Circuit Judges, and SUTTLE, District Judge.

SIMPSON, Circuit Judge: The determinative issue in this appeal is whether the appellants, as four county bar associations and a taxpayer-citizen-attorney, have standing to challenge the constitutionality of the Economic Opportunity Act of 1964, as amended, 78 Stat. 508, 42 U.S.C.A. § 2701 *et seq.*, or alleged acts or omissions of the Director of the Office of Economic Opportunity regarding the establishment of legal aid service programs in their counties pursuant to the Act.

Appellant Russell Troutman by an amended complaint of January 10, 1967, alleged that Office of Economic Opportunity Legal Services Programs had been instituted in Dade, Volusia and St. Lucie Counties,

Florida, and that the Director of the Office of Economic Opportunity had plans for imminent institution of an OEO Legal Services Program in Orange County, Florida, where Troutman is a citizen, taxpayer and practicing attorney. The complaint further alleged that if an OEO Legal Services Program were instituted in Orange County, Troutman would be deprived of the privilege and obligation of providing legal services to those who could not otherwise obtain representation and that he would be forced to compete with OEO lawyers for a clientele who could afford to obtain representation by Troutman. The complaint prayed for declaratory and injunctive relief, asserting the invalidity and impropriety of the Economic Opportunity Act and the impropriety and lack of authority of the Director's involvement with the profession of law.

The four local bar associations [1] moved to intervene as plaintiffs in Troutman's suit, charging that the defendants were operating,[2] promoting or prospectively would operate [3] OEO Legal Services Programs in their respective counties. Generally the movants sought relief similar to that demanded by Troutman.

The Court below held that none of the appellants had standing to maintain the action. Without ruling upon the merits or other jurisdictional defenses interposed by the defendants, the district judge dismissed Troutman's amended complaint with prejudice and denied the motions to intervene. This appeal ensued. We affirm.

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[1] The Orange County Bar, Osceola County Bar Association, Seminole County Bar Association, and St. Lucie County Bar Association.

[2] St. Lucie County.

[3] The other three counties.

In order to resolve the question whether appellants have standing to contest the validity and constitutionality of the Act or the actions of the Director, it must be determined whether they are proper persons to request an adjudication of issues raised by such action. "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen,* 1968, 392 U.S. 83, 99, 88 S.Ct. 1942, —, 20 L.Ed. 2d 947, 961. The status asserted by the person whose standing is challenged must be examined to ascertain whether there is a logical nexus between the status asserted and the claim sought to be adjudicated. *Id.* at 102. It is the existence of a logical nexus which ensures that "the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " *Id.* at 99, *quoting Baker v. Carr,* 1962 369 U.S. 186, 204, 82 S.Ct. 691, —, 7 L.Ed. 2d 663, 678.

The first status asserted by the appellants is that of federal taxpayer.

> "The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." *Id.* at 102.
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> "[I]n *Flast v. Cohen, supra,* * * * the [Supreme] Court set out the requirements which must be met by the taxpayer before he has standing. Essentially they are:
> 1. that he is in fact a taxpayer;
> 2. that the tax dollars are being expended in

the furtherance of specific government business;

3. that there is a substantial expenditure; and
4. that these expenditures exceed the limits imposed by the establishment clause of the first amendment on the taxing and spending powers in Aricle I."

Protestants and Other Americans, etc. v. Watson, D.C. Cir. 1968, 407 F. 2d 1264, 1265 [emphasis omitted].

It is important for our purposes that in *Flast v. Cohen* the majority pointed out that the *Flast* test of taxpayer standing is consistent with the result of the Court's prior decision in *Frothingham v. Mellon*, 1963, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078, which ruled that a federal taxpayer is without standing to challenge the constitutionality of a federal statute. *See Flast v. Cohen, supra* at 104–105. The difference between *Flast* and *Frothingham* was that in the former the taxpayer attacked the statute on the ground of its inconsistency with a specific limitation upon the congressional taxing and spending power: the Establishment Clause of the First Amendment, whereas in the latter the taxpayer's challenge was bottomed upon the general provisions of the Tenth Amendment and the Due Process Clause of the Fifth Amendment. "In essence, Mrs. Frothingham was attempting to assert the States' interest in their legislative perogatives and not a federal taxpayer's interest in being free of taxing and spending in contravention of specific constitutional limitations imposed upon Congress' taxing and spending power." *Flast v. Cohen, supra* at 105.

The appellants have not coupled their attack, as taxpayers, upon the Economic Opportunity Act with any specific limitation upon Congress' taxing and spending power and thus have failed to "establish a nexus be-

tween that status and the precise nature of the constitutional infringement alleged." *Id.* at 102. Therefore they were without standing to challenge the Act. *Frothingham v. Mellon, supra.*[4]

The appellants' further claims of standing as citizens and attorneys must also fail. Exactly as with the status of taxpayer *qua* taxpayer, these claims of status have not been coupled with any assertion of direct injury in violation of specific constitutional limitations. "It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." *Ex parte Levitt,* 1937, 302 U.S. 633, 634, 58 S.Ct. 1, 82 L.Ed. 493. [citations omitted.] See also *Dade-Commonwealth Title Ins. Co. v. North Dade Bar Ass'n,* Fla. 1963, 153 So. 2d 723, 726–27.

Neither do appellants have standing to challenge the Act or the actions of the Director because of their position as competitors, because they do not have the type of interest required to confer standing to challenge the Act in the status of competitors.

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[4] We have not overlooked our decision in Saxon, Comptroller of the Currency, etc. v. Georgia Assn. of Independent Insurance Agents, Inc. et al., 5 Cir. 1968, 399 F.2d 1010. Since that case involved the Comptroller's approval by regulation of competition made expressly unlawful by statute, it is inapposite. As we held there, the insurance agents had a "statutory aid to standing", op. cit. at 1018, in addition to their legal right to protect themselves from unlawful competition. There was thus presented in that case a dispute in the necessary concrete adversary context. *Flast*, supra. See the further explication in Judge Thornberry's specially concurring opinion in *Saxon*, op. cit. at 1019–1021.

In Florida, attorneys enjoy no protections from competition by those qualified to engage in legal services. Restricting the practice of law to those who have been examined and found qualified "is not done to aid or protect the members of the legal profession either in creating or maintaining a monopoly or closed shop. It is done to protect the public from being advised and represented in legal matters by unqualified persons * * *." *State ex rel. The Florida Bar v. Sperry,* Fla. 1962, 140 So. 2d 587, 595, *rev'd on other grounds,* 1963, 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed., 2d 428.

The decisions of the courts appear to be uniform in denying standing to competitors who otherwise possess no legal right to be free from competition. See *Tennessee Power Co. v. T.V.A.,* 306 U.S. 118, 137, 59 S.Ct. 423, —, 83 L.Ed. 543, 549 (1939); *Rural Electrification Admin. v. Central La. Elec. Co.,* 5 Cir. 1966, 354 F. 2d 859, cert. denied 358 U.S. 815, 87 S.Ct. 34, 17 L.Ed. 2d 54 (1966). These appellants lack such a legal right and hence lack standing.

The recent 8th Circuit case of *Association of Data Processing Service Organizations, Inc. v. Camp,* 8 Cir. 1969, 406 F. 2d 837, cert. granted 395 U.S. 976, — S.Ct. —, 23 L.Ed. 2d 764 (June 23, 1969), sets forth a clear summation of the holdings of prior cases as to the legal interest required for standing to sue as a competitor:

> "In summary, a plaintiff may challenge alleged illegal competition when as complainant it pursues (1) a legal interest by reason of public charter or contract, Frost v. Corporation Comm'n, supra, (2) a legal interest by reason of statutory protection, Baker, Watts & Co. v. Saxon, supra, or (3) a 'public interest' in which

> Congress has recognized the need for review of administrative action and plaintiff is significantly involved to have standing to represent the public, FCC v. Sanders Bros. Radio Station, supra. From this analysis, it seems clear that an allegation of 'illegal competition' is not the balancing determinant of a plaintiff's standing. The primary search must rest on whether the plaintiff's status is one which enjoys a private interest entitled to protection or is one which the law recognizes to be of such legal significance to allow a party to act as a public representative for a public interest."

Appellants earnestly argue that the Act itself confers standing upon them by virtue of the "Ichord Amendment," section 222(a)(3) of the Act, 42 U.S.C.A. § 2809(a)(3).[5] It is urged that, while the amendment does not expressly confer standing upon attorneys or bar associations as "aggrieved persons," *see, e.g., Scripps-Howard Radio, Inc. v. F.C.C.*, 1942, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229; *F.C.C. v. Sanders Bros. Radio Station*, 1940, 309 U.S. 470, 60 S.Ct. 693, 84 L.Ed. 869; it created a right of local bar associations to be consulted prior to approval or funding of legal services programs and by implication confers

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[5] The Ichord Amendment reads as follows:

> "The Director shall make arrangements under which the State bar association and the principal local bar associations in the community to be served by any proposed project authorized by this paragraph shall be consulted and afforded an adequate opportunity to submit, to the Director, comments and recommendations on the proposed project before such project is approved or funded, and to submit, to the Director, comments and recommendations on the operations of such project, if approved and funded." 42 U.S.C.A. §2809(a)(3).

standing to contest the Director's actions. We disagree.[6]

The Ichord Amendment as originally passed in 1966 provided that the Director was to consult with the local bar associations, but it was made clear at the time by the sponsor of the amendment that it was not intended to give the local bar associations any form of veto over proposed programs but rather was for the purpose of giving them an opportunity to present suggestions and recommendations as to the proposed programs. *See* 112 Cong. Rec. 24437 (Sept. 29 1966).[7] The provision as originally enacted was amended in 1967 to provide the State bar associations an opportunity to make comments and recommendations regarding proposed projects, but the amendment was explained as being for the purpose of providing more helpful assistance to the Director due to the broader base and typically better staff assistance which State bar associations can provide. See 113 Cong. Rec. No. 154, S13856 (Sept. 28, 1967).[8]

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[6] Appellants contend that the amendment was violated as to Orange and St. Lucie Counties. The pleadings assert that there was an O.E.O. Legal Service chartered and about to start operations in Orange County, while in St. Lucie County the O.E.O. Legal Services Program was already in operation. The O.E.O. was then promoting programs in Osceola and Seminole, the other two counties whose bar associations sought leave to intervene.

[7] Mr. Ichord: "* * * this does not give the local bar associations a veto over the proposed programs but merely gives the various bar associations the opportunity to present suggestions and recommendations thereon." 112 Cong. Rec. 24437 (Sept. 29, 1966).

[8] Senator Cooper explained the 1967 amendment which he introduced, as follows:

> The present language of the bill provides that in assisting in the provision of legal services to the poor, the director shall make arrangements with the principal

We are unpersuaded that the Ichord Amendment confers standing upon appellants because we perceive no legislative purpose in that amendment to protect a competitive interest of appellants. There are times when competitors are given standing by Congress to challenge competition which allegedly is in violation of a statute where the statute itself is said to be enacted for the express protection of the class of competitor complaining. In order to fall within this classification, however, the particular statutory provision invoked must reflect a legislative purpose to protect a competitive interest, *Hardin v. Kentucky Util. Co.,* 380 U.S. 1, 5–6, 88 S.Ct. 651, —, 19 L.Ed. 2d 787, 792 (1968). But where, as here the purpose of the statutory provision is simply to benefit the public at large by easing the task of administration of the statute no right, nor legal standing, is conferred.

Appellants' reliance upon *Abbott Laboratories v. Gardner,* 1967, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed. 2d. 681, is misplaced. *Abbott* involved an essentially *regulatory* statute requiring the petitioners to make significant changes in their everyday business practices, *id.* at 154, including the possible destruction of existing property rights, *id.* at 152, or possible criminal sanctions for noncompliance, *id.* at 154. Thus the Government there acted not as a competitor but as a regulator interfering with legally recognized rights. Where legally recognized rights such as the use or enjoyment of property are sought to be protected by im-

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bar associations in the area. My amendment provides that, in addition, they shall seek the advice and comments of the State bar association. I believe that State bar associations are more broadly based, and they usually have a staff which is better able to provide helpful assistance: 113 Cong. Rec. No. 154, S13856 (Sept. 28, 1967).

position of a consultation requirement as a condition precedent to agency action, the individuals affected by agency noncompliance with the condition, or organizations representing their interests, may have standing to contest the action by virtue of the condition. See *Citizens Ass'n v. Simonson,* D.C. Cir. 1968, 403 F. 2d 175. Appellants, however, have demonstrated no legal rights sought to be protected by Congress, there ordinarily being no right to be free from competition and the statute having been passed for the benefit of the public at large.

AFFIRMED.

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